

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BEVERLY ROSE

Claimant

VS.

HALLMARK CARDS, INC.

Respondent

Self-Insured

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Docket No. 241,763

ORDER

Respondent appeals the January 10, 2001, Award of Administrative Law Judge Brad E. Avery. Claimant was granted a 48.5 percent permanent partial disability for an injury occurring on September 11, 1998, based upon a 58 percent loss of wage earnings and a 39 percent loss of tasks. The only issue before the Board is the nature and extent of claimant's injury and/or disability. Oral argument before the Board was held on July 25, 2001. As Board Member David Shufelt has recused himself from this matter, Board Member Pro Tem Stacy Parkinson participated in the proceedings.

APPEARANCES

Claimant appeared by her attorney, James L. Wisler of Topeka, Kansas. Respondent appeared by its attorney, Gregory D. Worth of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations contained in the Award.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board finds as follows:

Claimant had been working for respondent for approximately four years as a stock handler. On September 11, 1998, while moving pallets with a pallet jack, claimant was injured when the pallet she was handling became entangled with another pallet. As the two pallets broke loose, the jack claimant was holding onto lurched, yanking claimant's left side towards the wall. Claimant felt an immediate pain in her left arm, up into the left side of her neck. She reported the injury to her supervisor, but she continued working the remainder of that day.

Claimant continued working for a period of time before seeking medical treatment. She was referred to Chris Donald Fevurly, M.D., a board certified internal medicine specialist with a secondary specialization in occupational medicine. Dr. Fevurly first examined claimant on September 22, 1998. At that time, claimant's symptoms were in her left shoulder and left upper back with occasional complaints into the neck.

After treating claimant conservatively, Dr. Fevurly referred claimant to orthopedic surgeon Richard G. Wendt, M.D., who performed a decompression of the left shoulder and a debridement of a partial rotator cuff tear on January 26, 1999.

After the surgery, claimant's shoulder pain improved considerably. However, the pain in her neck did not change. Claimant was referred for physical therapy and was placed on light duty which consisted of unwrapping rewraps. Claimant was able to continue working within the restrictions placed upon her by Dr. Wendt.

On December 15, 1998, claimant underwent an EMG nerve conduction study of her upper extremities and cervical spine with Dr. Morte. The neurological examination displayed no clinical evidence of cervical nerve root entrapment or entrapment of the peripheral nerve and, more specifically, the median or ulnar nerves in the left arm. The EMG nerve conduction study showed no abnormalities with regards to cervical radiculopathy or carpal tunnel syndrome.

An MRI of the cervical spine was performed on July 13, 1999, which revealed degenerative changes and tiny central disc bulges at C4-5 and C6-7. The MRI revealed no evidence of cord impingement, spinal stenosis or nerve root distraction. Dr. Fevurly last examined claimant on June 29, 1999.

Dr. Fevurly opined claimant had suffered a 5 percent impairment of the left shoulder based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

While he noted the degenerative changes in claimant's cervical spine and diagnosed myofascial pain syndrome in the cervical spine, he testified that the pain was not rateable pursuant to the AMA Guides, Fourth Edition. He did, however, acknowledge that claimant did have chronic pain in her neck. He simply testified that the AMA Guides do not contain any method for rating this condition.

Dr. Fevurly was provided a job task analysis by Michael Dreiling for the 15 years preceding claimant's injuries. In reviewing the eighteen tasks, Dr. Fevurly testified that claimant was capable of performing ten of those tasks, incapable of performing two of those tasks and could perform six of those tasks if she did the activities with her right arm only. There was no evidence in the record to indicate those six tasks were performed by claimant using her right arm only. In fact, some of the tasks appear to require that more than one arm would be used, while with others it is unclear.

The Appeals Board finds that claimant's job duties required she use both upper extremities. Therefore, the limitations to a right arm only would, in effect, be a conclusion that claimant is incapable, without accommodation, of performing those past tasks. The Appeals Board finds that Dr. Fevurly's task loss equates to a 44 percent loss pursuant to K.S.A. 1998 Supp. 44-510e.

Claimant was referred to P. Brent Koprivica, M.D., for an independent evaluation by his attorney. Dr. Koprivica examined claimant on August 10, 1999. Dr. Koprivica diagnosed status post debridement and open decompression of the left shoulder for a partial rotator cuff tear, chronic cervicothoracic strain and chronic right bicipital tendinitis from compensatory overuse.

Dr. Koprivica is the only doctor who diagnosed right bicipital tendinitis. Additionally, claimant did not testify at regular hearing to any difficulties associated with her right shoulder from the injury of September 11, 1998.

On April 12, 2000, claimant was referred to orthopedic surgeon Don B. W. Miskew, M.D., in Shawnee Mission, Kansas. This independent medical examination was ordered by Judge Avery due to the conflict in opinions between Dr. Fevurly and Dr. Koprivica. Dr. Miskew rated claimant at a 9 percent impairment to the body as a whole, which included a 5 percent impairment for the left shoulder problems, which equated to a 3 percent whole person impairment, and a 6 percent whole person impairment to claimant's cervical spine due to the aggravation of claimant's preexisting degenerative disc disease. This combined to a 9 percent impairment of the whole body pursuant to the AMA Guides, Fourth Edition. Dr. Miskew was not asked to do a task loss analysis.

Dr. Koprivica was presented the report of Mr. Dreiling. When Mr. Dreiling first considered the restrictions of Dr. Koprivica, he found claimant had suffered a 33 percent job task loss pursuant to those restrictions. When Dr. Koprivica was presented with this

opinion, he objected to the 33 percent finding. Dr. Koprivica testified that he had intended for his restrictions to be identical to those of Dr. Wendt.

Dr. Koprivica testified that he agreed with the restrictions placed upon claimant by Dr. Wendt and wanted his task loss to be identical. When specifically asked if he reviewed each of the eighteen tasks individually and applied any restrictions to those tasks, Dr. Koprivica agreed that he did not.

Dr. Koprivica rejected Mr. Dreiling's calculation of his task loss opinion of 33 percent and, instead, adopted Dr. Wendt's opinion of 67 percent without actually reviewing the list of tasks associated with that opinion.

Dr. Koprivica only reviewed the summary of tasks contained in Mr. Dreiling's report. Dr. Koprivica failed to review Dr. Wendt's work restrictions and compare those to the task list created by Mr. Dreiling. Therefore, the 67 percent loss of tasks adopted by Dr. Koprivica is not the opinion of any physician who actually testified in this matter. The Appeals Board rejects both the 33 percent opinion created by Mr. Dreiling and the 67 percent opinion adopted by Dr. Koprivica.

In workers compensation litigation, it is claimant's burden to prove her entitlement to the benefits requested by a preponderance of the credible evidence. See K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. K.S.A. 1998 Supp. 44-510e(a).

In this instance, the Board has three medical opinions to consider regarding claimant's functional impairment. Dr. Fevurly found claimant to have a 5 percent impairment with claimant's impairment being limited to the left shoulder. However, Dr. Fevurly acknowledged that claimant was diagnosed with and suffered from myofascial pain syndrome in the cervical spine. He testified that the AMA Guides, Fourth Edition, simply did not allow for an impairment for that condition. Therefore, he limited his functional impairment to claimant's shoulder, even though the claimant's pain complaints clearly included the neck.

Dr. Koprivica, on the other hand, in part, assigned claimant a functional impairment for her right shoulder which, as stated above, claimant did not testify to having injured on the date of accident. Dr. Koprivica testified claimant had suffered an overcompensation of the right shoulder. But, again, claimant's testimony does not support this alleged injury.

Therefore, the Appeals Board rejects Dr. Koprivica's 14 percent whole person impairment as it includes portions of the body not injured.

This leaves the functional impairment of Dr. Miskew from his independent medical examination. Dr. Miskew's impairment includes not only the left upper extremity and shoulder, but also includes a percentage of impairment for the cervical spine for the aggravation of claimant's preexisting degenerative disc disease. The Appeals Board finds that claimant's injury did encompass the cervical spine and was not limited to the left shoulder. Therefore, the 9 percent whole person impairment of Dr. Miskew is deemed the most appropriate and is adopted for the purposes of this award.

After the surgery, claimant was placed on light duty for a period of time. Ultimately, however, respondent concluded that they no longer had light duty available for claimant. In a meeting with respondent's human resources manager, Len Metzger, claimant was advised that the work within her restrictions in light duty was no longer available and there was no need for her to stay. Claimant did contact respondent several times after her termination to see if respondent could meet her restrictions, but respondent was never able to do so. Claimant did search for work and, at the time of the regular hearing, was working as a cashier at Wal-Mart earning \$6.50 an hour, working 37 to 40 hours a week. The Administrative Law Judge found that claimant was earning \$260 per week which, when compared to the stipulated average weekly wage of \$614.75, resulted in a wage loss of 58 percent.

K.S.A. 1998 Supp. 44-510e(a) defines permanent partial general disability as:

[T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Here, the Appeals Board finds the only credible evidence regarding claimant's task loss is that of Dr. Fevurly of 44 percent. Additionally, the Appeals Board finds the Administrative Law Judge's conclusion that claimant suffered a 58 percent wage loss is supported by the record as claimant, acting in good faith, obtained employment at Wal-Mart after her termination from respondent. In following the mandate of K.S.A. 1998 Supp. 44-510e, the Appeals Board finds claimant has a 51 percent permanent partial disability to the body as a whole.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award is made in favor of claimant, Beverly Rose, and against the respondent, Hallmark Cards, Inc., a qualified self-insured, for a 51 percent permanent partial disability to the body as a whole based upon an average weekly wage of \$614.75.

Claimant is entitled to 3.34 weeks temporary total disability compensation at the rate of \$366 per week totaling \$1,222.44, followed by 211.65 weeks permanent partial disability compensation at the rate of \$366 per week totaling \$77,463.90, for a total award of \$78,686.34.

As of August 6, 2001, claimant is entitled to 3.34 weeks temporary total disability compensation at the rate of \$366 per week totaling \$1,222.44, followed by 148.09 weeks permanent partial disability compensation at the rate of \$366 per week totaling \$54,200.94, for a total due and owing of \$55,423.38, which is ordered paid in one lump sum, minus any amounts previously paid. Thereafter, claimant is entitled to 63.56 weeks permanent partial disability compensation at the rate of \$366 per week totaling \$23,262.96 until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Gregory D. Worth, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director